SUPREME COURT, U. S.

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1748

CLIFFORD LAVERN BISHOP, LEWIS FRANK GRAYSON, NATHANIEL J. BRANCATO, GEORGE L. HUSONG, JAMES S. DUARDI, and JACK MICHAEL KING,
Petitioners,

vs

UNITED STATES OF AMERICA,
Respondent.

[redacted] **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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INDEX

Application for Stay of Mandate and for Release Pending Disposition of Petition for Writ of Certiorari 1

Exhibits:

Exhibit "A"—Motion for Stay of Mandate 4

Exhibit "B"—Opinion of the United States Court of Appeals for the Eighth Circuit, May 2, 1974 7

Exhibit "C"—Motion to Recall and Withdraw Mandate and for Reconsideration of Defendants' Motion for Stay of Mandate 8

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit 11

Opinion Below 11

Jurisdiction 12

Questions Presented 12

Constitutional Provisions Involved 12

Statutory Provisions Involved 13

Statement of the Case 15

Reasons for Granting the Writ 19

1. The Decision Below Raises Significant and Recurring Problems Concerning Exhibits Not Admitted in Evidence Going to the Jury During Its Deliberation 19

Exhibit "R" 19

Cumulative Prejudicial References 21

Conspiracy Submission 22

Conclusion 24

Appendix:

Appendix No. 1—Memorandum and Order of United States District Court for the Western District of Missouri, Western Division, January 9, 1973 27

Appendix No. 2—Opinion of the United States Court of Appeals for the Eighth Circuit, February 28, 1974 36

Appendix No. 3—Exhibit "R" 47

Citations

Cases

Chapman v. *California*, (1967) 386 U.S. 18 21
Crain v. *United States*, (1896) 162 U.S. 625 23
Fahy v. *Connecticut*, (1963) 375 U.S. 85 21
Finnegan v. *United States*, (8 CA, 1953) 204 F.2d 105 20
Kotteakos v. *United States*, (1946) 328 U.S. 750 21
Osborne v. *United States*, (8 CA, 1965) 351 F.2d 111 20
Thompson v. *City of Louisville*, (1960) 362 U.S. 199 24
United States v. *Adams*, (2 CA, 1967) 385 F.2d 548 21
United States v. *Douglas*, (7 Cir.) 155 F.2d 894 20
United States v. *Smith*, (2 CCA, 1940) 112 F.2d 83 24

Miscellaneous

Federal Rules of Criminal Procedure, Rule 7(c)(1) 23
Federal Rules of Criminal Procedure, Rule 52(a) 20
18 United States Code, Section 371 .....2, 13, 15
18 United States Code, Section 1952 .....2, 14, 15, 23
18 United States Code, Section 3148 "Bail Reform Act" 18
18 United States Code, Section 4208(b) 15
28 United States Code, Section 1254(1) 12
United States Constitution, Fifth Amendment 12
United States Constitution, Sixth Amendment 13, 20

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

CLIFFORD LAVERN BISHOP, LEWIS FRANK GRAYSON, NATHANIEL J. BRANCATO, GEORGE L. HUSONG, JAMES S. DUARDI, and JACK MICHAEL KING,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR STAY OF MANDATE AND FOR RELEASE PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Come now the Petitioners herein, by and through one of the counsel, Robert G. Duncan, and move this Honorable Court or any Justice thereof, for an order directed to the United States Court of Appeals for the Eighth Circuit directing it to recall and stay the issuance of its mandate and ordering the release of the Petitioners (except Petitioner Bishop) upon the bail bond upon which they are now released pending disposition before the United States Court of Appeals for the Eighth Circuit, or for some other order establishing and releasing the said Petitioners upon bail, pending the disposition of a Petition for Writ of Certiorari filed concurrently herein, for the following reasons:

1. That the Petitioners, the defendants below, were convicted by trial by jury in the United States District

Court for the Western District of Missouri, of conspiracy, in violation of *18 U.S.C. 371*, to violate *18 U.S.C. 1952*, by promoting and establishing an unlawful activity and by promoting such unlawful activity by traveling and causing others to travel in interstate commerce and by the use of telephone facilities in interstate commerce; and from said conviction Petitioners appealed to the United States Court of Appeals for the Eighth Circuit.

2. The United States Court of Appeals for the Eighth Circuit, per its opinion filed February 28, 1974, affirmed the convictions of the Petitioners, and their Petition for Rehearing, or for Transfer to the Court en Banc, and Supplementary Petition filed therein were denied on April 22, 1974.

3. That pending trial and said appeal each of the Petitioners, except Petitioner Clifford LaVern Bishop (who was incarcerated on another conviction) were released on bail.

4. Each Petitioner did and has appeared on each occasion that they have been required to and have fully complied with the terms and conditions of their release.

5. That on or about April 29, 1974, Petitioners filed in the United States Court of Appeals for the Eighth Circuit their Motion for Stay of Mandate, a copy of which is annexed hereto as "Exhibit A."

6. That said Motion for Stay of Mandate was denied on May 2, 1974, a copy of said order is annexed hereto as "Exhibit B".

7. That on or about May 4, 1974, Petitioners filed in the United States Court of Appeals for the Eighth Circuit their Motion to Recall and Withdraw Mandate and for Reconsideration of Defendants' Motion for Stay

of Mandate, a copy of which is annexed hereto as "Exhibit C". Said motion has not been ruled upon at the time of the preparation of this Application.

8. That Petitioners believe that they are entitled to relief and that justice would require that they remain free on their present bail and conditions of release pending the disposition of their Petition for Writ of Certiorari so as to enable them to continue to support and maintain their families, engage in their employment and operate their businesses and to assist their counsel in the preparation and presentation of these proceedings.

9. That the standards of the *Bail Reform Act, 18 U.S.C. 3148,* for release on bail pending appeal and certiorari have been satisfied and Petitioners are not likely to flee and are no danger to society or any other person.

10. That the Petition for Certiorari, which is filed concurrently herewith, presents substantial questions of law and is not frivolous or taken for delay. Petitioners would incorporate herein by this reference the said Petition for Certiorari.

WHEREFORE, Petitioners Grayson, Brancato, Husong, Duardi, and King, pray for an order of this Court to the United States Court of Appeals for the Eighth Circuit ordering it to recall and stay its mandate and allowing said Petitioners to remain free on bail pending the disposition of their Petition for Writ of Certiorari, and for such other and further relief as may be just and proper.

ROBERT G. DUNCAN
2700 Kendallwood Parkway
Kansas City, Missouri 64119
Counsel for Petitioners

Exhibit "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1287
The United States, Appellee,
vs.
Clifford Lavern Bishop, Appellant.

No. 73-1288
The United States, Appellee,
vs.
Lewis Frank Grayson, Appellant.

No. 73-1300
United States of America, Appellee,
vs.
Nathaniel J. Brancato, Appellant.

No. 73-1310
United States of America, Appellee,
vs.
George L. Husong, Appellant.

No. 73-1358
United States of America, Appellee,
vs.
James S. Duardi, Appellant.

No. 73-1705
The United States, Appellee,
vs.
Jack Michael King, Appellant.

Appeals from the United States District Court
for the Western District of Missouri

MOTION FOR STAY OF MANDATE

Come now the appellants, and each of them, and move this Honorable Court for an order staying the issuance of the mandate herein under *Federal Rules of Criminal Procedure, Rule 41*, for the following reasons:

1. That the opinion of the Court affirming the convictions below was filed February 28, 1974.

2. That thereafter a timely motion for rehearing was filed.

3. That on April 22, 1974, this Court issued its order denying the petition for rehearing.

4. That the appellants are desirous of filing a petition for certiorari to the Supreme Court of the United States.

5. That the issues in this cause are such that are likely to be heard by the Supreme Court of the United States, and include, but not limited to:

(a) The jury having in the jury room during its deliberation, an exhibit that was not admitted in evidence and to which an objection has been sustained.

(b) The appellants' *Sixth Amendment* right to cross-examine the "F.B.I. agents" which prepared the exhibit, the same purportedly being a summary or recap of telephone company records.

(c) The application of the Harmless Error Rule in the above situation.

(d) The impeachment of the chief defense witness by an exhibit which was in the presence of the jury during its deliberation, but which was not admitted in evidence, and contained reference to phone calls not shown in evidence.

(e) That the opinion conflicts with the decision of the Supreme Court in *Fahy* v. *Connecticut*, 375 U.S. 85, and with the opinion of the Court of Appeals for the Second Circuit in *United States* v. *Adams*, 385 F.2d 548.

(f) The submission to the jury in the instructions of the Court of an offense not proven, which violates due process of law under the *Fifth Amendment* of the United States Constitution.

WHEREFORE, the appellants and each of them, pray for an order of this court staying the issuance of the mandate herein for thirty (30) days.

Duncan & Russell

By: Robert G. Duncan

2700 Kendallwood Parkway

Kansas City, Missouri 64119

454-7300

Attorney for Appellants

Copy of the above and foregoing mailed this 26th day of April, 1974, to the United States Attorney, United States Courthouse, 811 Grand, Kansas City, Missouri 64106.

Exhibit "B"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1973

73-1287
The United States, Appellee,
vs.
Clifford Lavern Bishop, Appellant.

73-1288
The United States, Appellee,
vs.
Lewis Frank Grayson, Appellant.

73-1300
United States of America, Appellee,
vs.
Nathaniel J. Brancato, Appellant.

73-1310
United States of America, Appellee,
vs.
George L. Husong, Appellant.

73-1358
United States of America, Appellee,
vs.
James S. Duardi, Appellant.

73-1705
The United States, Appellee,
vs.
Jack Michael King, Appellant.

Appeals from the United States District Court for
the Western District of Missouri.

Appellants' motion for stay of mandate has been considered by the court and is denied.

May 2, 1974

Exhibit "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1287
The United States, Appellee,
vs.
Clifford LaVern Bishop, Appellant.

No. 73-1288
The United States, Appellee,
vs.
Lewis Frank Grayson, Appellant,

No. 73-1300
United States of America, Appellee,
vs.
Nathaniel J. Brancato, Appellant.

No. 73-1310
United States of America, Appellee,
vs.
George L. Husong, Appellant.

No. 73-1358
United States of America, Appellee,
vs.
James S. Duardi, Appellant.

No. 73-1705
The United States, Appellee,
vs.
Jack Michael King, Appellant.

Appeals from the United States District Court for
the Western District of Missouri

MOTION TO RECALL AND WITHDRAW MANDATE AND FOR RECONSIDERATION OF DEFENDANTS' MOTION FOR STAY OF MANDATE

Come now the appellants, and each of them, and move this Honorable Court for an order recalling the mandate issued herein, and for reconsideration of the appellants' Motion for Stay of Mandate, timely filed herein, for the following reasons:

1. That by opinion of this Court, the convictions of the appellants below was affirmed on February 28, 1974.

2. That a timely Motion for Rehearing was filed, which said motion and petition was overruled on April 22, 1974.

3. That appellants filed a timely motion for stay of mandate, which said stay was denied on May 2, 1974, and the mandate issued.

4. That appellants were sentenced under the provisions of *Title 18, Section 4208(b)*, United States Code, for the purpose of obtaining a detailed study upon which sentence could be imposed.

5. That the defendants appealed from that judgment and sentence and that a final sentence has not yet been imposed.

6. That there is still pending the Government's application under *Title 18, Section 3575*, United States Code.

7. That a proper study under *4208(b)* could not and would not be had as long the appellants had any possible appeal recourse, either to this Court or to the Supreme Court of the United States by way of writ of certiorari.

8. The Honorable Judge John W. Oliver, the trial judge, indicated, as demonstrated by the transcript of pro-

ceedings on April 20, 1973, that he felt that the study would not be proper until all appeals were over. Co-counsel in this matter has discussed this with Judge Oliver and he has reaffirmed, that that is still his position.

9. That justice would not be delayed or hindered by staying the mandate until petition for writ of certiorari had been made to the Supreme Court and disposed of.

10. That the defendants do not now pose any danger to society or to other persons, and are not likely to flee pending petition for writ of certiorari.

11. That the appellants would reallege and incorporate herein their original motion for stay of mandate filed herein.

WHEREFORE, the appellants would pray for an order recalling and withdrawing the mandate, and for reconsideration of their original motion to stay mandate, and for an order staying the mandate for 30 days or until petition for writ of certiorari is made to and acted upon by the United States Supreme Court.

Duncan & Russell
By: Robert G. Duncan
2700 Kendallwood Parkway
Kansas City, Missouri 64119
454-7300
Attorney for Appellants

Copy of the above and foregoing mailed this 3rd day of May, 1974, to the United States Attorney, United States Courthouse, 811 Grand Avenue, Kansas City, Missouri 64106.

.....
Attorney for Appellants

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

CLIFFORD LAVERN BISHOP, LEWIS FRANK GRAYSON, NATHANIEL J. BRANCATO, GEORGE L. HUSONG, JAMES S. DUARDI, and JACK MICHAEL KING,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, and each of them, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 28, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The United States District Court for the Western District of Missouri rendered two written opinions, one on January 9, 1973, and the second on February 28, 1973. The pertinent parts of each order also appear in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 28, 1974. A timely petition for rehearing, or for transfer to the Court en Banc, and supplemental motions, were filed therein and were denied on April 22, 1974. This petition for certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under *28 U.S.C., Section 1254(1)*.

QUESTIONS PRESENTED

1. Were the Petitioners unconstitutionally denied a fair trial because a Government exhibit which was not admitted in evidence was sent to the jury during its deliberation?

2. Were the Petitioners unconstitutionally denied a fair trial because of the accumulation of and cumulative effect of numerous prejudicial references, evidence and statements?

3. Did the trial court err in submitting to the jury the alleged conspiracy to engage in a business involving gambling, prostitution and bribery, in the conjunctive, when there was insufficient and insubstantial evidence to support a conviction in regard to the prostitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or in-

dictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

STATEMENT OF THE CASE

The Petitioners were charged and tried upon one count of an Indictment alleging conspiracy, in violation of *18 U.S.C. 371,* to establish, etc., an unlawful activity, being a business involving *gambling and prostitution and bribery* in violation of the laws of Oklahoma, by traveling and causing travel in interstate commerce and by using an interstate wire communication facility in violation of *18 U.S.C. 1952,* the so-called *Travel Act.*

After a trial by jury before the Hon. John W. Oliver, United States District Judge for the Western District of Missouri, the jury returned a verdict of guilty as to all six defendants. Their post-trial motions were denied and they were sentenced under *18 U.S.C. 4208(b)* to the maximum term authorized by law.

The evidence tended to establish that Lewis Frank Grayson was a local district attorney in an area including Grove, Oklahoma and that the Petitioner, George L. Husong, was a special investigator for Grayson. One Jess Roberts, who is alleged to be a co-conspirator and was the main Government witness, owned, among other businesses, the Mr. Yuk Club, and the Thunderbird Club in Grove, Oklahoma. Petitioner King operated the Showboat Club in Grove. Petitioner Brancato owned and operated several businesses, including an amusement park in Kansas City, Missouri. Petitioner Duardi operated a club in Kansas City, and was a very close friend of co-conspirator Olivia Mae Pitts. Petitioner Bishop was a friend and some type of employee of Duardi.

The Indictment alleged that the conspiracy was "between on or about the 26th day of August, 1971, and on or about the 26th day of March, 1972." The evidence, taken in the light most favorable to the verdict, tended

to establish that Roberts built the Yuk Club in Grove, and opened it on August 26, 1971. On May 12, 1971, Roberts told Grayson of his plans for building an entertainment center, and Grayson told him what he would allow at the club in regard to age, hours, and liquor. Roberts also discussed the club with Sheriff Rosell. After he opened he was raided six times and charges were filed against him as a result of his selling intoxicating liquors illegally.

All of the evidence hereinafter mentioned regarding conversations between the parties is according to the testimony of Roberts, unless otherwise pointed out.

In October of 1971 Roberts met Brancato, who regularly vacationed in the Grove area and on December 5, 1971, he met Bishop. Shortly thereafter Bishop called Roberts and said he had an idea that would make money—a new business together. He met Bishop in Kansas City, Missouri, and Bishop suggested starting a vending machine business. Duardi and Brancato joined in the meeting and they discussed the raids. Upon leaving Duardi and Brancato told Bishop that whatever he worked out was fine.

On January 7, 1972, Grayson led a raid on Mr. Yuk and seized all the furniture and equipment. On January 12th or 13th, Bishop, in an automobile leased to Brancato, was in Grove, and he and Roberts made arrangements to lease a building for the vending machine business, and they spoke to defendant King regarding the possibility of him participating in the business. King agreed. Bishop said that before they would invest and let Roberts run the business they wanted some type of guarantee. On January 13, 1972, King, Bishop and Roberts drove to Kansas City, and an attorney prepared a partnership agreement as a guarantee.

King told Roberts he had arrangements, through his attorney, a state senator, with Grayson and Husong to have poker games. King suggested Roberts speak to Husong. That same day Brancato came to the Mr. Yuk and he, Bishop and Roberts discussed possibly expanding the club. Roberts, who was going to take over the vending machine business, needed a new manager of Mr. Yuk and so he introduced Bishop to the employees as possibly the new manager. Bishop never really took over operations but only acted in a good will status.

On January 14, 1972, Roberts spoke to Husong and asked him if there was any way to stop the raids so he could expand the club. Husong, according to Roberts, said he was close to Grayson and could get the raids stopped and let him have bingo, poker and maybe slot machines if Rosell got defeated in the next election. Husong said they needed 20% of the gambling proceeds and that Roberts would have to get the club out of his name. They met again on January 15th, and Husong said Roberts needed a new car for Sheriff Rosell, since Grayson couldn't control Rosell. There was no mention of prostitution in any of these discussions.

On January 15th, Roberts went to Kansas City to see Durardi, Bishop and Brancato and told them of his conversations with Husong. Brancato suggested that they lease a car for the sheriff so that it could be taken back if there were any more raids. It was discussed that wealthy Kansas City men would fly to Grove to party and gamble and that girls would entertain and be companions. Prostitution was not discussed.

On January 16th Roberts met Husong and Grayson and they talked only in generalities. Grayson said he thought a friendly poker game was OK and that Roberts could believe anything Husong said.

Further meetings, conversations and a trip to Kansas City took place, and plans to expand the club into an amusement area and park were made and a loan was to be obtained from the S.B.A. by Mrs. Pitts.

On February 4, 1973, Bishop picked up a leased car which Brancato had arranged for. Bishop delivered the car to Husong. Husong made all the lease payments and Grayson decided to keep the car himself and made a loan on the automobile for $2,000.

On February 25th Husong told Roberts the I.R.S. men were coming to Grove. Husong, in private, told Roberts the deal was off, they would keep the car, but would get no percentage. On the 29th King told Roberts that Bishop and Duardi decided to let things cool off.

Grayson was never at any of the meetings with the Kansas City defendants and Roberts never discussed the car with Sheriff Rosell. Roberts started cooperating with federal agents March 23, 1972.

No actual gambling or prostitution was shown in evidence. None of the defendants testified. Mrs. Olivia Pitts, called by the defense, testified that she was a very old and close friend of the defendant Duardi, and that she had an inheritance and had discussed with Duardi making investments. Duardi suggested the Grove area. She was interested in buying the land that surrounded the club as a location for a motel and amusement park. It was for sale and Roberts was in financial difficulty.

The jury returned a verdict of guilty as to all six defendants. In the Court's order overruling petitioner's post trial motions the trial court advised the Petitioners that Government's Exhibit R, although not admitted in evidence, had been in the jury room during its deliberations. Said Exhibit R was a summary of telephone calls

from various telephones to which the Petitioners and Mrs. Pitts had access, which was prepared by an F.B.I. agent. The trial court found this to be error but that it was harmless. The Court of Appeals agreed.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Significant and Recurring Problems Concerning Exhibits Not Admitted in Evidence Going to the Jury During Its Deliberation.

Exhibit R

The Eighth Circuit's opinion in this case (page 8) found that the delivery of Exhibit R to the jury constituted error. That Court then found that the error was harmless and therefore not reversible. This was based upon its finding that the Government's case, although based upon the testimony of an impeached accompliice, was overwhelming. The Court of Appeals also based its opinion upon the fact that the parties had agreed to the identification of the alleged underlying documents (the telephone company records), even though those documents were not admitted in evidence. Thus, the Court of Appeals has held that an exhibit prepared by a person whom the defendants have not had the opportunity to cross-examine, from records not admitted in evidence, which exhibit identifies the telephones as belonging to the various defendants and co-conspirators (when in fact most of them were public phones) and which show a great number of phone calls back and forth between the alleged conspirators who are allegedly engaging in an unlawful business promoted by use of the telephone, and which tends to impeach the only defense witness (it shows phone calls between Mrs. Pitts and some of the defendants before she testified she

ever met them), may be given to the jury during its deliberations even though objections to it were sustained and it was not admitted in evidence.

During the trial various witnesses testified as to seeing Roberts and various of the defendants together and various documents established that Roberts made the various trips he testified to, but no document or witness corroborated the fact of a conspiracy. It was only Roberts' testimony that gave those meetings and documents any incriminating meaning.

Exhibit R was 27 pages long, showed 243 telephone calls, and was the only corroboration of all but one phone call to which Roberts testified. Four of the Overt Acts alleged in the indictment pertain to telephone calls. One of these alleged phone calls was the only testimony that put Petitioner Duardi directly into the conspiracy. The jury deliberated six and one-half hours.

Apparently, exhibits not admitted in evidence going to a jury during its deliberations is a recurring problem. See *Osborne* v. *United States,* (8 CA, 1965) 351 F.2d 111, *United States* v. *Douglas,* (7 Cir.) 155 F.2d 894, *Finnegan* v. *United States,* (8 CA, 1953) 204 F.2d 105, and numerous other decisions. The *Sixth Amendment* guarantees that a defendant in a criminal case shall have the right to confront the witnesses against him. Can the submission to a jury during its deliberations of an exhibit prepared by a government agent which is the only evidence of many of the phone calls and the only corroboration of the Government's only true incrimination witness, which also impeaches the only defense witness, be any less constitutionally not permissible? *Federal Rules of Criminal Procedure, Rule 52(a)* provides that, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This Rule has been used

more and more as an escape to avoid reversals of convictions based on rather substantial errors. In our present case a basic fundamental trial right, that is that only exhibits admitted in evidence may be seen by the jury, was abridged. The test of harmlessness has been the subject of several decisions of this Court. See *Chapman* v. *California*, (1967) 386 U.S. 18, *Fahy* v. *Connecticut*, (1963) 375 U.S. 85, *Kotteakos* v. *United States*, (1946) 328 U.S. 750. The question has also bothered the various circuits, and the opinion below appears to conflict with the decision of the Second Circuit in *United States* v. *Adams*, (2 CA, 1967) 385 F.2d 548, where that Court said:

> "True, it is hard to conceive that if they had been, defense counsel would have been able to weaken them either by cross-examining the agent or by showing a history of fabrication. But the principle that the jury may consider *only matter that has been received in evidence is so fundamental* that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted."

Cumulative Prejudicial References

During the trial numerous prejudicial references were made. During voir dire the Indictment was read, including the reference that King and Bishop on March 16, 1972, "would and did attempt to kill Jess C. Roberts." This was also referred to during the Government Attorney's opening statement and although the trial court indicated its grave doubt that such evidence was admissible and the Government Attorneys agreed not to go into the matter, the Government's witnesses continued to "skate on awful thin ice". One witness testified he remembered a particular day because, "that was the day Mr. Roberts was shot," and Roberts testified about his being in the hospital when he first spoke to Government agents.

Other references in evidence were to the effect that Bishop had been "sent down to work Jess (Roberts) over." There was also evidence, admitted over objection, that Petitioner Grayson secured a loan on the leased automobile, which of course proved another crime, although it was not alleged as an overt act nor as an object of the conspiracy. There was also references in evidence to "the boys" and that Duardi had "people to answer to", insinuating that there was some type of mastermind or organization behind the defendants.

None of the Petitioners testified, but during closing argument, the Government Attorney asked the jury to "contrast the government's evidence with the defense evidence consisting of cross-examination and Mrs. Pitts", that, "As you saw, there was very little in the way of a defense", and that every witness who could discredit Roberts had testified (thus inferring that the defendants couldn't have). No cautionary instruction was given by the trial court in regard to these matters.

Petitioners submit that such continual prejudicial references denied them a fair trial and that although maybe no single instance amounted to prejudicial reversible error that the cumulative effect required reversal. This is certainly a recurring problem in the trial of criminal causes and is one that this Court should examine and establish guidelines for trial courts.

Conspiracy Submission

The Indictment herein alleges in the conjunctive that the defendants conspired to establish an unlawful activity, being a business enterprise involving gambling *and* prostitution, *and* bribery, in violation of the laws of the State of Oklahoma, by traveling and causing travel in interstate commerce, and by using and causing the use of interstate

wire communication facility, in violation of *Section 1952, Title 18, United States Code.*

Federal Rules of Criminal Procedure, Rule 7(c)(1) provides that an indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged, and further provides "it may be alleged in a single count that the means by which the defendant committed the offense are unknown, or that he committed it by one *or* more specific means."

There was no evidence whatsoever, whether beyond a reasonable doubt or otherwise, that there was any conspiracy or any contemplated business enterprise involving prostitution. Mr. Roberts testified that it was anticipated that girls from Kansas City or other areas would double as waitresses and "if some gentleman asks for their companionship for the evening, it could be arranged". It is upon that bit of testimony that the Government rose or fell on its allegation of an involvement of prostitution. In the list of matters which Grayson allegedly told Roberts were OK, prostitution was not mentioned.

The submission of prostitution was over the objections of the Petitioners and the submission was in the disjunctive rather than in the conjunctive as alleged in the Indictment. Petitioners recognize that this Court has held that even though an Indictment alleges the objects of a conspiracy in the conjunctive that a verdict can stand if there is proof that the defendant had done any one of the objects alleged. See *Crain* v. *United States*, (1896) 162 U.S. 625. Petitioners submit that this should be re-examined. The difficulty is that the Court has no way of knowing which object the jury found. If the jury found the existence of a conspiracy involving prostitution then it is not supported by sufficient or substantial evidence and that vio-

lates due process. See *Thompson* v. *City of Louisville,* (1960) 362 U.S. 199.

The opinion of the Eighth Circuit below approving such submission appears to conflict with the decision of the Second Circuit in *United States* v. *Smith,* (2 CCA, 1940) 112 F.2d 83, where that Court said, loc. cit. 86:

> (the defendant being charged with conspiring to commit four different offenses)
>
> "Clearly there was sufficient proof for the jury to convict on the charge of conspiracy to commit the first two offenses. It is elementary that the jury needed to find a conspiracy to commit only one of the four offenses, in order to convict, but appellant was entitled to insist that if there was not sufficient proof of a conspiracy to commit any one of the four offenses, the jury should be instructed to disregard that offense, and consider only a conspiracy to commit the other three."

In our present case, the defendants in view of their objections as to the sufficiency of the evidence, were entitled to such an instruction.

This, again, is a recurring problem in conspiracy cases (and more and more prosecutions are taking the conspiracy route). Guidelines are needed in order to insure fair trials for defendants.

CONCLUSION

Petitioners respectfully submit that this cause involves a decision that conflicts with a decision in other circuits, involves important questions of federal law which has not been, but should be, settled by this Court, and that

the decision below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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APPENDIX

APPENDIX 1

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 23939-1

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES S. DUARDI, et al.,
Defendants.

MEMORANDUM AND ORDER

(Filed January 9, 1973)

This case pends on the defendants' timely filed joint motion for acquittal, to set aside the verdict, and, in the alternative, for a new trial. We shall rule that motion and direct further proceedings in regard to two other matters.

I.

The suggestions in support of the defendants' post-trial motions accurately state that "all the grounds relied upon in the instant motion were raised during the trial of this case and fully discussed with the Court in all respects." Defendants' suggestions do not direct the Court's attention to any authorities not heretofore considered during the trial of the case. Defendants expressly recognize that the citation of the same cases to which the Court's attention had

already been directed would merely "duplicate the arguments already of record."

We have reviewed our notes and have reconsidered the questions presented in defendants' pending motion. We find and conclude for the reasons which, for the most part, have already been stated of record that the sixteen grounds stated in defendants' pending motion are without merit.

Accordingly, such motion and defendants' joint alternative motion for new trial will be denied.

On December 21, 1972 counsel for defendant James S. Duardi filed a motion for acquittal, to set aside the verdict, and, in the alternative, for new trial. That motion was not filed within the time provided in Rule 33 of the Rules of Criminal Procedure. The ground stated, however, was ruled at trial. We indicate of record that had defendant Duardi's motion been timely filed, it would have been denied on the merits for reasons stated in connection with the Court's action in granting defendants' motion for bill of particulars.

II.

Counsel will recall that shortly after the jury resumed its deliberation the morning after the case had been submitted to it, it requested all of the exhibits. Counsel for all defendants agreed that all exhibits admitted in evidence should be sent to the jury. Counsel also agreed that the numerous exhibits attached to Court Exhibit 1, which was a pretrial stipulation relating to the authenticity of exhibits which might be adduced in evidence, should not be sent to the jury. Procedures were directed by the Court at that time which were designed to avoid the complications of any inadvertent transmittal of any exhibit which had been offered but not admitted in evidence. It is the

Court's recollection that specific reference was made to difficulties encountered in the case of *Osborne* v. *United States,* (8th Cir., 1965) 351 F. 2d 111.

We deem it our duty to advise the parties that in spite of the precautions taken, the deputy clerk who served during the trial of the case, advised the Court that when he collected the exhibits after the trial he found that Government Exhibit R, the telephone toll record exhibit, had been found with the exhibits that went to the jury room. Apparently that exhibit had inadvertently been sent to the jury room with the other exhibits. That fact was not communicated to the Court until after all counsel had left the courthouse.

Under the circumstances, we deem it appropriate that the Court indicate its tentative view of the question presented, exercising power under Rule 52 of the Rules of Criminal Procedure, and that counsel be afforded an opportunity to make any further record which they may deem appropriate.

There is little doubt that it was error for the jury to have seen Government Exhibit R. Counsel will recall that during our discussion of defendants' objections to that exhibit the Court stated that defendants' objections were valid only in a limited sense and that the difficulty with the exhibit in the form it was offered was that many phone calls which had no probative value (in that they simply reflected calls between pay telephones in public places) were listed together with records of telephone calls between identified individuals which could be relevant.

Indeed, the record of the call from Mrs. Pitts' telephone number to that of defendant Bishop on January 19, 1972, about which Mrs. Pitts was cross-examined without objection is an example of the relevancy and materiality of a particular call between telephone numbers of identified

individuals. At any rate, counsel for the government were advised at our discussion out of the presence of the jury that the Court would admit Exhibit R in a form which would eliminate the calls between the public pay phones which did not identify the individual making the call, but that it would sustain defendants' objection to Exhibit R in the form that Exhibit was originally offered.

The government, however, failed to alter the form of Exhibit R and simply offered the exhibit in its original form. We, of course, adhered to our indicated ruling and sustained defendants' objection to the government's offer. It is obvious that Exhibit R should not have been sent to the jury and that error occurred when it was sent.

It is my tentative view that Rule 52 (a) requires this Court to determine whether that error, inadvertent as it may have been, did or did not affect the substantial rights of the defendants. Rule 52 (a) requires that such error shall be disregarded if it is determined that the substantial rights of the defendants were not affected. Rule 52 (b), of course, requires that such error must be noticed if it is concluded that the substantial rights of the defendants were affected.

Judge Van Oosterhout's opinion in *Osborne* v. *United States, supra,* collects the cases where the question presented has been discussed. The exhibit in *Osborne* which erroneously went to the jury was found to have contained "highly damaging, and prejudicial matter which could well have an effect upon the jury's verdict." Such a finding required that the defendant in that case be granted a new trial.

But neither *Osborne* nor any other case with which we are familiar, suggests that a *per se* rule is applicable to all cases in which the jury sees an exhibit which was not admitted in evidence. The error implicit in the circum-

stance of the two exhibits not admitted in evidence which went to the jury in *Finnegan* v. *United States,* (8th Cir., 1953) 204 F. 2d 105, for example, was found to be not prejudicial under the circumstances of that case.

It is our tentative view that the question of whether any substantial rights of the defendants were affected must be determined on a case by case basis and that, as stated in *Kotteakos* v. *United States,* 328 U.S. 750, 762 (1946), "in the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations." *Kotteakos* teaches that where the judge "is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress."

On the other hand, *Kotteakos* also teaches that:

> . . . If one cannot say, with fair assurance, after pondering all that happened, without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. . . .
>
> The inquiry can not be merely whether there was enough to support the result, apart from the phase affected by the error; it is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

The Eighth Circuit cases and other Supreme Court cases which apply the rule were recently collected in *United States* v. *Porter,* (8th Cir., 1971) 441 F. 2d 1204 at 1215.

I believe it appropriate to state that it is my tentative view that I do not deem it in the interest of justice to rule this type of question upon any theory that counsel were afforded a full and fair opportunity to check the exhibits for themselves. Judge Gardner gave some weight to that consideration in holding the error involved in *Finnegan* to be not prejudicial. And Judge Weick in *United States* v. *Yoepolo*, (6th Cir., 1970) 435 F. 2d 625 at 627, flatly stated that the duty rested upon counsel for both parties "to make sure that no exhibit which has not been admitted in evidence will be sent into the jury room [and that] counsel ought not to leave this task solely to the clerk." It seems to me, unless counsel are able to locate authority which we have not found, that determination of the question of whether the substantial rights of a defendant were affected can not be avoided by a simple determination that their counsel may have failed to have discharged a responsibility which rested upon them.

It is my tentative judgment that I am required to reach on the merits the question of whether there was, in fact and in law, a possibility that the harm, if any, occasioned by the error can be fairly said to have had anything except a very slight effect upon the verdict. I tentatively am of the judgment that I must eventually decide, on the merits, whether it must be said to be doubtful, under the entire circumstances of the case, that the verdict of the jury could not have been substantially swayed by the error.

I do not believe that those questions should be determined without affording counsel for the defendants an appropriate opportunity to present and brief what they deem to be the questions presented and to make argument in any manner which they deem appropriate. Our order will therefore direct further proceedings in this regard.

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 23939-1

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES S. DUARDI, et al.,
Defendants.

MEMORANDUM AND ORDER DENYING DEFENDANTS' SUPPLEMENTAL AND JOINT MOTION UNDER RULE 52

(Filed February 28, 1973)

Part II of our memorandum opinion of January 2, 1973, was devoted to the question presented by the inadvertent transmittal of Exhibit R to the jury. All defendants, pursuant to leave granted in our order of January 2, 1973, filed the pending supplemental and joint motion for acquittal, to set aside the verdict, or, in the alternative, for a new trial. That motion will be denied for the reasons we now state.

Defendants agree that *Osborne* v. *United States,* (8 Cir., 1965) 351 F. 2d 111, and the cases therein cited, correctly state the applicable principles of law. The standards set forth in *Kotteakos* v. *United States,* 328 U.S. 750 (1946), are easy to state but extremely difficult to apply. A hint in regard to how truly difficult is the judicial task commanded by that case is contained in the phrase from *Kotteakos* which requires that the trial judge may act only after "pondering all that happened."

After pondering all that happened, and after giving the question the most careful consideration, including the assistance received from the briefs filed by counsel, I find that I may and must say, with fair judicial assurance, that the verdict of the jury was not, in my judgment, substantially swayed by whatever consideration the jury may have given Exhibit R which it was erroneously, although inadvertently, permitted to see. I therefore conclude that no substantial right of any defendant was thereby affected.

I further state, in the language of *Kotteakos*, that I have not limited my inquiry to merely considering whether there was sufficient evidence to support the verdict apart from Exhibit R; but rather, I have considered whether the error itself may have had any substantial influence on the jury's verdict. After the most careful consideration which may be judicially given such a question, under the circumstances, I do not entertain any significant judicial doubts about my stated findings and conclusion.

The jury in this case would not have, in my judgment, returned the verdicts which it did return unless it decided that the government's key witness, Roberts, was worthy of belief. There can be no doubt, as one of the defendant's brief put it, that "Mr. Roberts indeed needed all the assistance he could get." The difficulty with the defendant's argument, however, is that, in my judgment, Exhibit R simply did not significantly corroborate any significant portion of Roberts' testimony one way or the other. And very much for the reasons stated in the defendant's brief, to which we have made reference.

That brief pointed out "most of the calls cannot with certainty be attributed to a given defendant nor is the subject matter of the conversations identified." That brief correctly noted that the phone calls were made from pay

telephone booths, a fact which was independently known to the jury from other evidence in the case.

When all is said and done, defense counsel was, in my judgment, correct when he candidly stated that "the verdict of the jury indicates that the jurors believed the essential points in the testimony of Jess Roberts." To which should be added our finding that independent evidence was adduced and admitted without objection in regard to any significant telephone call which could in any reasonable way be said to have even remotely been corroborative of what counsel stated are the "essential points" in Roberts' testimony. Quite frankly, I believe that a strong case can be made to support the idea that the only really significant evidence in regard to any telephone call in the entire case were those to which we directed attention on page 3 of our memorandum opinion of January 2, 1973.

Interrogation of the jury under the circumstances of this case would not be proper under principles which we fully stated in *Beanland* v. *Chicago, Rock Island and Pacific Railroad Co.*, (W.D. Mo., 1972) 345 F. Supp. 220, which we incorporate in this memorandum by this reference.

Accordingly, and for the reasons stated, it is

ORDERED that defendants' pending supplemental and joint post-trial motion should be and the same is denied for the reason that we find and conclude that the inadvertent error which occurred in regard to Exhibit R did not in fact or in law affect the substantial rights of any defendant in this case.

/s/ John W. Oliver
District Judge

Kansas City, Missouri
February 28, 1973

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 73-1287, 73-1288, 73-1300, 73-1310, 73-1358, 73-1705

United States of America, Appellee,
v.
Clifford Lavern Bishop, Appellant.

United States of America, Appellee,
v.
Lewis Frank Grayson, Appellant.

United States of America, Appellee,
v.
Nathaniel J. Brancato, Appellant.

United States of America, Appellee,
v.
George L. Husong, Appellant.

United States of America, Appellee,
v.
James S. Duardi, Appellant.

United States of America, Appellee,
v.
Jack Michael King, Appellant.

Appeal from the United States District Court for
the Western District of Missouri

Submitted: December 13, 1973

Filed: February 28, 1974

Before BRIGHT and STEPHENSON, Circuit Judges, and STUART, District Judge.*

STEPHENSON, Circuit Judge.

Appellants were convicted under 18 *U.S.C.* § 371 of conspiring to violate 18 *U.S.C.* § 1952, by promoting and establishing an unlawful activity, and by promoting such unlawful activity by travelling and causing others to travel in interstate commerce and by the use of telephone facilities in interstate commerce. The case was tried to a jury before the Honorable John W. Oliver, United States District Judge, Western District of Missouri, upon Count I of a two count indictment.

These consolidated appeals raise the principal question of whether an exhibit not admitted into evidence, but inadvertently delivered to the jury during its deliberations by the court clerk, constituted prejudicial error, thus necessitating a new trial. Insufficiency of the evidence and other trial errors are also urged. After carefully considering this record totalling nearly one thousand pages, we conclude that appellants were not prejudiced by the errors alleged, and therefore affirm the conviction. *Fed. R. Crim. P.* 52(a).

The essence of the conspiracy is that between August 26, 1971 and March 26, 1972, appellants together with Olivia Mae Pitts and Jess C. Roberts, named in the indictment as co-conspirators but not defendants, conspired to promote and establish an unlawful business enterprise involving gambling, prostitution and bribery in violation of the laws of the State of Oklahoma. Interstate travel and use of the telephone facilities in interstate commerce were involved.

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*W. C. STUART, District Judge, Southern District of Iowa, sitting by designation.

The government's evidence is briefly summarized as follows: On May 12, 1971, co-conspirator Roberts met with appellant Grayson, then an Oklahoma State District Attorney, for the purpose of discussing Roberts' plan to erect a private club in the vicinity of Grove, Oklahoma (within Grayson's jurisdiction). The club, known as "Mr. Yuk," was opened on August 26, 1971. Shortly after its opening Mr. Yuk experienced a series of raids by local authorities and charges were eventually filed against Roberts for the illegal sale of intoxicating liquors. As a result of the raids Roberts experienced financial difficulties.

In mid-December, appellant Bishop, an employee of appellant Duardi, a Kansas City, Missouri night club owner, telephoned Roberts from Kansas City and indicated that he could help Roberts with the raids problem through various political connections. Bishop also indicated to Roberts that he had an idea to make money in a business venture. Roberts then flew to Kansas City and met with appellants Bishop, Duardi and Brancato. The latter owned several businesses in the Kansas City area. During the course of the meeting, Duardi and Brancato suggested to Roberts that they might be able to help eliminate some of the raids. On January 7, 1972, Mr. Yuk was again raided, charges were filed and all the furniture from within the club was seized. Owner Roberts later met with District Attorney Grayson who said that "he had to do it [stage the raid] for political purposes."

On January 12 and 13, 1972, Bishop visited Grove, Oklahoma and met with appellant King and Roberts, and discussed establishing a "vending" machine business. King, who owned the "Show Boat" Club, also, in the vicinity of Grove, indicated that he too had been having problems with local officials; that Duardi saw to it that charges filed against him were reduced or dropped, and that he

(King) in turn gave Duardi a partnership in the Show Boat. On January 13, 1972, Bishop, Roberts and King drove to Kansas City and had a partnership agreement prepared which gave Bishop an interest in Mr. Yuk. On the return trip, King indicated that he had a prior arrangement with appellants Grayson and Husong, a special investigator for District Attorney Grayson, which provided for gambling at the Show Boat.

On January 14, 1972, Roberts met with investigator Husong who indicated that the raids on Mr. Yuk could be stopped and that gambling could be arranged. Husong told Roberts that in return he and Grayson needed 20% of the gambling proceeds "to keep other law enforcement officers away from Mr. Yuk,"[1] and that they needed a new car for the local Sheriff. Roberts told Husong that an additional room would be added to Mr. Yuk for gambling, that there would be a motel, an amusement park and gambling at the Show Boat, owned by appellants King and Duardi, and that rather than giving 20% of the gambling proceeds he would pay 5% of the profits of the entire operation. The next day, Roberts met with appellants Bishop, Brancato and Duardi in Kansas City to discuss the proposed agreement to be reached with investigator Husong and District Attorney Grayson. They also discussed financing the operation through the Bureau of Indian Affairs or the Small Business Administration, and further, that "girls" could be employed to entertain and be companions for the customers.

Bishop later confirmed the arrangements with investigator Husong, and then telephonically described some of

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1. The record discloses that "other law enforcement officers" allegedly referred to the State Alcoholic Beverage Control Board, local Sheriff Lloyd Rosell and Leo Albro of the Oklahoma State Crime Bureau.

the final details to Duardi. Several meetings followed to discuss financing and construction. Mrs. Pitts (co-conspirator) who met with appellants, was described by Duardi as a person who could obtain an "S.B.A., or Indian loan." On February 3, 1972, Roberts and Bishop engaged in a telephone conversation between Grove and Kansas City in connection with the arrangements with local authorities. On February 4, 1972, Bishop arrived in Grove with a 1972 Chevrolet Impala, which he and Roberts gave to investigator Husong as part of the "deal." Subsequently District Attorney Grayson used the auto. (The auto was leased rather than purchased ostensibly to permit its repossession should the "deal" fail.)

It was later learned that appellants would be unable to secure an S.B.A. loan. Husong, King and Bishop blamed Roberts for the failure to secure this financing. According to Roberts, however, Husong subsequently told Roberts that "Mr. Grayson and himself were going to acknowledge all of the agreements we had had prior to that time concerning the notification of the raids, allowing gambling in the club, were going to keep the car that had been given them, but they would make the payments on the car and they would expect no percentage out of the gambling." Roberts replied "that it couldn't work that way * * * once this was started we had to stick to it, there was too much money had been spent to back out at this time." On February 29, 1972, King, who was in Denver with Bishop and Roberts to secure a bingo machine for Mr. Yuk, learned in a telephone conversation with his wife at Grove that Internal Revenue men were in Grove. It was agreed they "would let things lay quiet for a while until this simmered down."

Appellants were subsequently indicted on the conspiracy charge which alleged 22 overt acts.[2] Warrants were issued for their arrests on August 23, 1972. Of the eighteen witnesses who testified during the course of the trial, all but one were called by the government. Co-conspirator Roberts was the chief witness for the government. His testimony was corroborated in several respects by other employees who testified. Co-conspirator Pitts was called by the defense.

A great deal of documentary evidence was introduced during the course of the trial. Among the offered exhibits was the government's Exhibit R, purporting to be "a summary of telephone records and the corresponding business records of telephone companies upon which that summary is based, prepared by F.B.I. agents."[3] Judge Oliver refused to admit Exhibit R because of the form of the

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2. Overt Act #22 under Count I of the indictment, charged that "on or about March 16, 1972, Clifford Lavern Bishop and Jack Michael King attempted to kill Jess C. Roberts near Grove, Oklahoma."

In chambers, Judge Oliver warned that proof of the shooting of Roberts as an overt act "might introduce problems of prejudicial evidence * * *." Government counsel therefore agreed to avoid this area of examination. Under careful guidance of the trial court no evidence with respect thereto was admitted. Overt Act #22 was not submitted to the jury.

3. Transcript at 658. Of the twenty-two overt acts under Count I of the indictment, four related to telephone calls. Exhibit R was captioned "Key to review of telephone toll records." Its intended use was to summarize allegedly relevant telephone company toll records aggregated in stipulation Exhibit E, admitted as part of Court Exhibit 1. Stipulation Exhibit E consisted of "true and accurate copies of the business records of Southwestern Bell and Century Telephone Companies." It was further stipulated that telephones bearing certain telephone numbers were either listed to various named individuals, or were pay telephones, and that the telephones were located at designated locations at the particular times and dates indicated on the face of the records. Exhibit R contained a listing by date of telephone calls made from and to specified numbers which were identified, i.e., (Yuk), (Grayson), etc. The exhibit itself did not purport to show who actually made the call or participated in it.

exhibit.[4] He later explained in his order of January 2, 1973, that "defendants' objections to that exhibit were valid only in a limited sense and that the difficulty with the exhibit in the form it was offered was that many phone calls which had no probative value (in that they simply reflected calls between pay telephones in public places) were listed together with records of telephone calls between identified individuals which could be relevant."

Shortly after the jury began its deliberation it requested all the exhibits. Counsel agreed that all exhibits admitted into evidence should be sent to the jury, but that exhibits attached to court Exhibit 1 (the pretrial stipulation relating to authenticity of certain exhibits, see *note* 3, *supra*) should not be included. In the presence of defense counsel and with the telephonic approval of government counsel, Judge Oliver directed the court clerk to check all exhibits carefully so that evidence not admitted could not inadvertently be transmitted to the jury. The jury deliberated approximately six and one-half hours and returned guilty verdicts as to all defendants. Despite the precautions taken, the court clerk advised the court that when he collected the exhibits after the trial he found Government Exhibit R among the exhibits that went to the jury room.

Appellants now urge that such transmission constitutes reversible error, necessitating a new trial.

It is undisputed that the delivery to the jury of Exhibit R constitutes error. *Osborne* v. *United States*, 351 F.2d 111, 115 (CA8 1965); *accord*, *Dallago* v. *United States*, 427 F.2d 546, 555 (D.C. Cir. 1969). But, unless the error

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4. The government failed to delete the records of phone calls which the court ruled had no probative value.

was prejudicial to "substantial rights" of appellants, the verdict and judgment will stand.[5] *Kotteakos* v. *United States*, 328 U.S. 750, 764-65, 66 S. Ct. 1239, ... (1946); *Osborne* v. *United States*, *supra*, 351 F.2d 111, 117 (CA8 1965); *see*, *United States* v. *Warner*, 428 F.2d 730, 736-38 (CA8 1970). In order for error to be declared harmless the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendants' conviction. *Chapman* v. *California*, 386 U.S. 18, 87 S. Ct. 824 (1967). In *Homan* v. *United States*, 279 F.2d 767, 771 (CA8 1960), we stated:

> The reviewing court must, of course, be able to say with fair assurance that the errors complained of could not, with natural operation in the total setting and proceedings had, be regarded as having possessed any influencing effect. *Blackwell* v. *United States*, 244 F.2d 423, 421 (CA8 1957).

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5. The issue of appellants' failure to screen the exhibits is not before us. We of course would not affirm on this basis where appellants had suffered substantial prejudice. See, *United States* v. *Burket*, 480 F.2d 568, 571 (CA2 1972). However, we noted from the record that at least one defense counsel in the instant cause was an attorney of record in the *Osborne* case, also tried before Judge Oliver. In spite of all the precautions taken herein in light of *Osborne*, to assure that only proper exhibits were sent to the jury, the record indicates that only the court clerk examined the exhibits. We realize that the methods used for transmission of exhibits to the jury are within the discretion of the trial court. Nevertheless, in light of the continuing nature of this problem, we strongly urge the position of the First Circuit stated in *United States* v. *Yoppolo*, 435 F.2d 625, 627 (CA6 1970):

> [W]hen a case is ready for submission to the jury, counsel for both parties should look over all the exhibits to make sure that no exhibit which had not been admitted in evidence will be sent into the juryroom. They ought not to leave this task solely to the clerk.

See, *United States* v. *Sheehan*, 428 F.2d 67, 72 (CA8 1970); *see also*, *Dallago* v. *United States*, *supra*, 427 F.2d 546, 554 (D.C. Cir. 1969).

The weight of the government's evidence is relevant in determining the effect of the error. *United States* v. *Straughan*, 453 F.2d 422, 427 (CA8 1972); *Osborne, supra* at 118. In this case, it is abundantly clear from the lengthy trial record, that the evidence of guilt is overwhelming. The significant testimony of the government's key witness, although admittedly an accomplice, was substantially corroborated by other credible testimony. As such, Exhibit R did not serve to corroborate any significant portion of Roberts' testimony. We fully agree with Judge Oliver's statement in his order of February 28, 1973 which denied appellants' supplemental and joint motion under *Fed. R. Crim. P.* 52, that "independent evidence was adduced and admitted without objection in regard to any significant telephone call which could in any way be said to have remotely been corroborative of what counsel stated are the 'essential points' in Roberts' testimony." The fact that some of the calls were made from pay telephones was a fact independently known to the jury by other evidence in this record.

As previously noted, the objectionable nature of Exhibit R was its form. It was not rendered inadmissible because it was highly inflammatory or prejudicial. Our decision in *Osborne, supra,* is distinguishable on this basis. The original telephone records which served as an official source for Exhibit R were all in court, identification had been waived, and they were made a part of the record available to all parties.[6] Furthermore, as acknowledged by defense counsel during oral argument of this appeal, no objection was made with respect to the accuracy of the exhibit. In the form in which it was offered Exhibit R simply lacked probative value with respect to certain telephone calls. The most that can be said is that the

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6. Stipulation Exhibit E, Court Exhibit 1, *note* 3, *supra.*

exhibit showed a large number of calls to and from the listed numbers during the period indicated.

In the final analysis, we are satisfied beyond a reasonable doubt that on this record the error in question did not have any influencing effect upon the jury, and therefore did not contribute to the convictions. *Chapman* v. *California, supra,* 386 U.S. 18, 23, 87 S. Ct. 824, 827 (1967); *Homan* v. *United States, supra,* 279 F.2d 767, 771 (CA8 1960); *accord, United States* v. *Porter,* 441 F.2d 1204 (CA8 1971); *see, Kotteakos* v. *United States, supra,* 328 U.S. 750, 764-65, 66 S. Ct. 1239, 1248 (1946); and *compare, United States* v. *Straughan, supra,* 453 F.2d 422, 427 (CA8 1972) *with United States* v. *Warner, supra,* 428 F.2d 730, 736-38 (CA8 1970); *see also, Fahy* v. *Connecticut,* 375 U.S. 85, 86-87, 84 S. Ct. 229, 230 (1963). Judge Oliver did not abuse his discretion in denying appellants' motion for a new trial because of the jury's exposure to Exhibit R.

Appellants next contend that they were denied a fair trial because of the accumulation and cumulative effect of multiple prejudicial references, evidence and statements throughout the trial.[7] We are satisfied from a careful examination of this record that whatever potential prejudice there may have been was cured by appropriate instructions by Judge Oliver.

Lastly, appellants urge that the trial court erred by submitting to the jury the alleged offense of conspiracy to engage in a business enterprise involving gambling, prostitution and bribery, and in the conjunctive, that there

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7. Among appellants' claims are allegedly improper references made with respect to Overt Act #22 by the government in its opening statement, not then objected to (*see also, note* 2, *supra*), and to another criminal act of appellant Grayson in mortgaging lease property (automobile), evidence purporting to establish a nexus between appellants and organized crime, and improper argument by government counsel.

was not sufficient evidence to support a conviction. This record overwhelmingly substantiates appellants' guilt in all respects. The convictions of guilt are therefore affirmed.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX 3

EXHIBIT "R"

KEY TO REVIEW OF TELEPHONE TOLL RECORDS

Telephone Number	*Referred to Hereinafter as*	*Located At*
918-786-9271	Husong	10-59 Salvage Yard, owned and operated by defendant George L. Husong, south of Grove, Oklahoma, on Highway 59
918-676-9205	Stardust R. or Restaurant	Stardust Restaurant, Fairland, Oklahoma
918-676-9207	Stardust M.	Stardust Motel, Fairland, Oklahoma
918-786-5109	Hill's Camp	Hill's Camp Resort, Grove, Oklahoma
816-763-8200	LEIU	Law Enforcement Intelligence Unit, Kansas City, Missouri, Police Department 106th and Blue Ridge, Kansas City, Missouri
918-786-2153	Cotner	Dr. N. A. Cotner, Grove, Oklahoma
918-786-5026	Cotner	Dr. N. A. Cotner Grove, Oklahoma
918-786-2916	Husong	Residence of defendant George L. Husong, 32 Shelia, Grove, Oklahoma

Telephone Number	*Referred to Hereinafter as*	*Located At*
918-786-9444	Yuk	Mr. Yuk Club, owned and operated by Jess C. Roberts in Grove, Oklahoma
918-786-9913	Grove General Hospital	Grove General Hospital, Grove, Oklahoma
918-786-9920	Yuk	Mr. Yuk Club, owned and operated by Jess C. Roberts in Grove, Oklahoma
918-786-9925	Grove Municipal Airport	Grove Municipal Airport, Grove, Oklahoma
918-786-9935	Lyle's	Lyle's Drive-IN, Grove, Oklahoma
918-786-9936	Thunderbird	Thunderbird Club, owned by Jess C. Roberts and operated by Ace N. Wright, Grove, Oklahoma
918-786-9952	Tommy's Steak or Tommy's	Tommy's Steakhouse, Main Street, Grove, Oklahoma
918-287-1773	Pitts	Residence of Grace Rogers, Aunt of Olivia Pitts, Pawhuska, Oklahoma
816-333-2066	Brancato	Office of Fairyland Drive-In, owned and operated in part by Nathaniel J. Brancato, 77th and Prospect, Kansas City, Missouri

Telephone Number	*Referred to Hereinafter as*	*Located At*
816-333-3440	Brancato	Bobby D's East, owned and operated in part by Nathaniel J. Brancato, 8305 S. 71 Highway, Kansas City, Missouri
816-361-1181	Duardi	Residence of defendant James S. Duardi, 1010 West 70th Terr., Kansas City, Missouri
816-363-2008	Brancato	Fairyland Park & Drive-In Theatre, owned and operated in part by Nathaniel J. Brancato
816-363-9925	Old Fortress	Pay Phone located at Old Fortress Bar, 1205 East 85th Street, Kansas City, Missouri, owned and operated by defendant James S. Duardi
816-444-8647	Brancato	Bobby D's Bar, owned and operated in part by Defendant Nathaniel J. Brancato, 8243 Wornall, Kansas City, Mo.
816-471-5577	Brancato	Fairyland Park & Drive-in owned and operated by defendant Nathaniel J. Brancato, 7501 Prospect, Kansas City, Missouri

Telephone Number	*Referred to Hereinafter as*	*Located At*
816-483-8562	Bishop	Residence of defendant Clifford Lavern Bishop which is occupied only by Clifford Lavern Bishop and immediate family, 332 Myrtle Avenue, Kansas City, Missouri
816-942-5810	Brancato	Residence of defendant Nathaniel J. Brancato, 1007 West 114th Terrace, Kansas City, Missouri
918-542-5547	DA	Office of the defendant Lewis Frank Grayson, Ottawa County Courthouse, Miami, Oklahoma
918-678-2411	King	Residence of defendant Jack Michael King, Wyandotte, Oklahoma
918-678-9292	Showboat	Pay phone located at Showboat Club, owned and operated by defendant Jack King.
918-542-2730	Grayson	Residence of defendant Lewis Frank Grayson, located at 1518 Lincoln Boulevard, Miami, Oklahoma

FROM:	TO:
September 18, 1971	
918-678-9292 (Showboat)	918-786-9920 (Yuk)
September 21, 1971	
918-786-9271 (Husong)	918-542-5547 (DA)
September 28, 1971	
918-678-9292 (Showboat)	918-786-9920 (Yuk)
October 6, 1971	
918-768-9292 (Showboat)	918-786-9920 (Yuk)
October 11, 1971	
918-678-9292 (Showboat)	918-786-9920 (Yuk)
October 17, 1971	
918-678-9292 (Showboat)	918-786-9920 (Yuk)
October 20, 1971	
816-363-2008 (Brancato)	918-786-5109 (Hill's Camp)
November 14, 1971	
918-678-9292 (Showboat)	918-786-9920 (Yuk)
November 29, 1971	
918-786-9271 (Husong)	918-542-5547 (DA)
November 30, 1971	
918-786-2916 (Husong)	918-542-5547 (DA)
December 1, 1971	
918-786-9444 (Yuk)	918-768-9292 (Showboat)
December 2, 1971	
816-483-8562 (Bishop)	918-678-9292 (Showboat)
816-483-8562 (Bishop)	918-678-2411 (King)
December 8, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)
December 10, 1971	
918-786-9444 (Yuk)	918-678-9292 (Showboat)
816-483-8562 (Bishop)	918-678-2411 (King)

FROM:		TO:	
December 22, 1971			
	918-786-2916	(Husong)	918-542-5547 (DA)
December 25, 1971			
	816-483-8562	(Bishop)	918-678-2411 (King)
December 28, 1971			
	918-542-5547	(DA)	918-786-9444 (Yuk)
December 31, 1971			
	918-786-2916	(Husong)	918-678-9292 (Showboat)
	918-678-9292	(Showboat)	816-483-8562 (Bishop)
January 1, 1972			
	918-786-9444	(Yuk)	918-678-9292 (Showboat)
	918-786-2916	(Husong)	918-542-2730 (Grayson)
	816-483-8562	(Bishop)	918-678-9292 (Showboat)
	816-483-8562	(Bishop)	918-678-2411 (King)
January 3, 1972			
(two calls)	918-786-9444	(Yuk)	918-678-9292 (Showboat)
January 6, 1972			
	918-786-9921	(Blue Note Lounge)	918-678-9292 (Showboat)
January 9, 1972			
	816-483-8562	(Bishop)	918-678-2411 (King)
(two calls)	918-786-2916	(Husong)	918-542-2730 (Grayson)
January 10, 1972			
	918-542-5547	(DA)	918-786-2916 (Husong)
January 11, 1972			
	918-786-9444	(Yuk)	918-542-5547 (DA)
(two calls)	816-483-8562	(Bishop)	918-678-9292 (Showboat)

FROM:	TO:
January 12, 1972	
918-676-9207 (Stardust M.)	816-473-8562 (Bishop)
January 13, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)
January 14, 1972	
918-678-9292 (Showboat)	918-786-9920 (Yuk)
918-786-9444 (Yuk)	816-483-8562 (Bishop)
918-786-2916 (Husong)	918-678-9292 (Showboat)
918-786-2916 (Husong)	918-542-2730 (Grayson)
January 15, 1972	
918-678-9292 (Showboat)	918-786-9936 (Thunderbird)
918-678-9292 (Showboat)	918-786-9920 (Yuk)
816-483-8562 (Bishop)	918-786-9444 (Yuk)
January 17, 1972	
816-483-8562 (Bishop)	918-786-9444 (Yuk)
January 18, 1972	
918-786-9444 (Yuk)	816-483-8562 (Bishop)
918-786-9952 (Tommy's	816-483-8562 (Bishop)
Steak House)	816-483-6562 (Bishop)
January 19, 1972	
918-786-9952 (Tommy's)	816-483-8562 (Bishop)
918-287-1773 (Ola Mae Pitts)	816-483-8562 (Cliff Bishop)
816-444-8647 (Brancato)	918-678-9292 (Showboat)
816-444-8647 (Brancato)	918-678-9292 (Showboat)
816-444-8647 (Brancato)	918-287-1773 (Pitts)
January 20, 1972	
816-483-8562 (Bishop)	918-786-9444 (Yuk)
918-786-2916 (Husong)	918-542-5547 (DA)
January 22, 1972	
918-786-9936 (Thunderbird)	918-678-9292 (Showboat)
918-786-9952 (Tommy's)	816-483-8562 (Bishop)

FROM:	TO:
January 23, 1972	
918-678-9292 (Showboat)	918-786-9920 (Yuk)
January 24, 1972	
918-786-9920 (Yuk)	918-678-9292 (Showboat)
918-786-9444 (Yuk)	816-483-8562 (Bishop)
918-786-9444 (Yuk)	816-361-1181 (Duardi)
January 25, 1972	
(two calls) 918-786-9444 (Yuk)	918-678-9292 (Showboat)
918-786-9920 (Yuk)	918-678-9292 (Showboat)
918-678-9292 (Showboat)	918-786-9444 (Yuk)
918-786-2916 (Husong)	918-542-5547 (DA)
January 26, 1792	
918-542-5547 (DA)	816-763-8200 (LEIU-Ray Kinney)
January 28, 1972	
918-786-9444 (Yuk)	918-287-1773 (Pitts)
918-542-5547 (Grayson)	816-763-8200 (LEIU)
816-483-8562 (Bishop)	918-786-9444 (Yuk)
918-786-2916 (Husong)	918-542-2730 (Grayson)
January 29, 1972	
918-786-9444 (Yuk)	918-678-9292 (Showboat)
816-483-8562 (Bishop)	918-287-1773 (Pitts)
(two calls) 918-678-9292 (Showboat)	918-786-9920 (Yuk)
918-287-1773 (Ola Pitts)	816-361-1181 (Duardi)
January 30, 1972	
918-678-9292 (Showboat)	918-786-9920 (pay phone at Yuk Club)
918-678-9292 (Showboat)	918-786-9920 (Yuk)
918-786-9444 (Yuk)	918-542-2730 Grayson

FROM:		TO:
(two calls)	918-786-9920 (Yuk)	918-678-9292 (Showboat)
	816-333-2066 (Brancato)	918-287-1773 (Pitts)
	816-333-2066 (Brancato)	918-287-1773 (Pitts)
February 1, 1972		
	918-542-5547 (DA)	816-763-8200 (LEIU)
	918-287-1773 (Ola Pitts)	202-224-3121 (Wash., D.C.)
February 2, 1972		
	918-678-9292 (Showboat)	918-786-9920 (Yuk)
	816-483-8562 (Bishop)	918-786-9444 (Yuk)
February 3, 1972		
	918-786-9444 (Yuk)	918-253-4531 (Sheriff Rosell Delaware City. S.O., Jay, OK)
	816-333-3440 (Brancato)	918-786-9444 (Yuk)
	816-333-3440 (Brancato)	918-786-9444 (Yuk)
February 4, 1972		
	918-287-1773 (Ola Pitts)	918-786-9444 (Yuk)
	918-678-9292 (Showboat)	918-786-9920 (Yuk)
	816-444-8647 (Brancato)	918-786-9444 (Yuk)
February 5, 1972		
	918-678-9292 (Showboat)	918-786-9920 (Yuk)
(two calls)	918-786-2916 (Husong)	918-542-2730 (Grayson)
February 6, 1972		
	918-678-9292 (Showboat)	918-786-9920 (Yuk)
	918-676-9207 (Stardust M.)	816-361-1181 (Duardi)
	918-676-9207 (Stardust M.)	816-483-8562 (Bishop)
	918-786-2916 (Husong)	918-542-2730 (Grayson)
February 7, 1972		
	918-786-9444 (Yuk)	918-678-9292 (Showboat)
	918-678-9292 (Showboat)	918-786-9444 (Yuk)

FROM:		TO:	
February 8, 1972			
	918-786-2916	(Husong)	918-542-5547 (DA)
February 9, 1972			
	816-483-8562	(Bishop)	918-678-9292 (Showboat)
	918-786-2916	(Husong)	918-542-5547 (DA)
	918-786-2916	(Husong)	918-542-2730 (Grayson)
(two calls)	918-542-5547	(DA)	918-786-2916 (Husong)
February 10, 1972			
	918-786-9444	(Yuk)	816-483-8562 (Bishop)
	918-786-9935	(Lyle's Drive-in)	816-483-8562 (Bishop)
	918-786-2916	(Husong)	918-678-9292 (Showboat)
	918-542-5547	(DA)	918-786-2916 (Husong)
	918-786-2916	(Husong)	918-542-5547 (DA)
(two calls)	918-786-2916	(Husong)	918-542-2730 (Grayson)
February 11, 1972			
	918-678-9292	(Showboat)	918-786-9920 (Yuk)
	918-786-9444	(Yuk)	918-678-9292 (Showboat)
	918-676-9207	(Stardust M.)	816-483-8562 (Bishop)
(two calls)	918-786-9444	(Yuk)	816-474-4200 (Feld Auto Leas.)
	918-542-5547	(DA)	918-786-2916 (Husong)
February 12, 1972			
(two calls)	918-678-9292	(Showboat)	918-786-9444 (Yuk)
	918-786-9925	(Grove Municipal Airport)	816-363-3925 (Old Fortress)
	918-676-9207	(Stardust M)	816-361-1181 (Duardi)
February 13, 1972			
	918-786-9444	(Yuk)	918-678-9292 (Showboat)

FROM:		TO:	
February 14, 1972			
	918-786-9920	(Yuk)	816-483-8562 (Bishop)
	918-678-9292	(Showboat)	918-786-9920 (Yuk)
February 15, 1972			
(two calls	816-483-8562	(Bishop)	918-678-9292 (Showboat)
	918-786-2916	(Husong)	816-483-8562 (Bishop)
	918-786-2916	(Husong)	918-542-2730 (Grayson)
February 16, 1972			
	918-786-9444	(Yuk)	816-483-8562 (Bishop)
	918-786-9920	(Yuk)	918-678-9292 (Showboat)
	816-363-2008	(Brancato)	918-287-1773 (Pitts)
February 17, 1972			
(two cases)	918-678-9292	(Showboat)	918-786-9920 (Yuk)
	918-786-9952	(Tommy's)	918-287-1773 (Pitts)
	918-786-9952	(Tommy's)	816-361-1181 (Duardi)
	918-786-9444	(Yuk)	918-287-1773 (Pitts)
	918-786-9920	(Yuk)	918-678-9292 (Showboat)
	918-287-1773	(Pitts)	918-786-9444 (Yuk)
February 18, 1972			
	918-678-9292	(Showboat)	918-786-9444 (YUk)
	918-786-2916	(Husong)	918-542-2730 (Grayson)
February 21, 1972			
	918-678-9292	(Showboat)	918-786-9920 (Yuk)
	918-678-9292	(Showboat)	918-786-9920 (Yuk)
February 23, 1972			
	816-483-8562	(Bishop)	918-786-9444 (Yuk)
	816-483-8562	(Bishop)	918-678 9292 (Showboat)
February 24, 1972			
(two calls)	918-786-9444	(Yuk)	816-483-8562 (Bishop)
	918-678-9292	(Showboat)	918-786-9920 (Yuk)

FROM:		TO:	
February 25, 1972			
	918-676-9205 (Stardust R.)	918-542-5547	(DA)
	918-678-9292 (Showboat)	918-786-9920	(Yuk)
(two calls)	918-678-9292 (Showboat)	918-786-2916	(Husong)
	918-786-2916 (Husong)	918-678-9292	(Showboat)
February 26, 1972			
	918-786-9920 (Yuk)	918-678-9292	(Showboat)
	918-678-9292 (Showboat)	918-786-2916	(Husong)
	918-786-2916 (Husong)	918-678-9292	(Showboat)
	918-786-2916 (Husong)	918-542-2730	(Grayson)
February 27, 1972			
	918-542-2730 (Grayson)	918-678-9292	(Showboat)
February 28, 1972			
	918-786-9444 (Yuk)	303-399-6974	(Denver)
(two calls)	918-786-9444 (Yuk)	816-483-8562	(Bishop)
	918-786-2916 (Husong)	918-542-5547	(DA)
	918-542-5547 (DA)	918-786-2916	(Husong)
	918-786-2916 (Husong)	918-542-5547	(DA)
February 29, 1972			
	816-473-8562 (Bishop)	918-678-9292	(Showboat)
	918-786-9925 (Grove Airport) (billed to 918-786-9721)	303-388-4811	(Denver)
	918-786-? (billed to 918-786-9271 (Husong)	303-333-9783	(Denver)
March 1, 1972			
	918-542-2730 (Grayson)	918-786-2916	(Husong)
	918-786-9920 (Yuk)	918-678-9292	(Showboat)
	918-676-9205 (Stardust R.)	918-287-1773	(Pitts)

FROM:		TO:	
	918-786-2916	(Husong)	918-542-2730 (Grayson)
	918-542-2730	(Grayson)	918-786-2916 (Husong)
March 5, 1972			
	918-786-9920	(Yuk)	918-678-9292 (Showboat)
	816-942-5810	(Brancato)	918-786-9444 (Yuk)
March 6, 1972			
	918-786-9920	(Yuk)	918-678-9292 (Showboat)
	918-786-2916	(Husong)	918-678-9292 (Showboat)
	918-542-5547	(DA)	918-786-2916 (Husong)
March 7, 1972			
	918-678-9292	(Showboat)	816-483-8562 (Bishop)
March 8, 1972			
	918-542-5547	(DA)	918-786-2916 (Husong)
March 9, 1972			
	918-542-2730	(Grayson)	918-786-2916 (Husong)
	918-786-9920	(Yuk)	918-678-9292 (Showboat)
	918-786-9920	(Yuk)	918-542-2730 (Grayson)
	918-542-2730	(Grayson)	918-786-2916 (Husong)
	918-542-5547	(DA)	918-786-2916 (Husong)
March 10, 1972			
	918-542-2730	(Grayson)	918-786-2916 (Husong)
	918-786-2916	(Husong)	918-678-9292 (Showboat)
	918-542-2730	(Grayson)	918-786-2916 (Husong)
March 11, 1972			
	918-786-9952	(Tommy's)	816-483-8562 (Bishop)
(two calls)	918-786-9920	(Yuk)	918-678-9292 (Showboat)
	918-786-2916	(Husong)	918-678-9292 (Showboat)
	918-678-9292	(Showboat)	918-786-9920 (Yuk)
	918-786-2916	(Husong)	918-542-2730 (Grayson)

FROM:		TO:	
March 12, 1972			
	918-678-9292	(Showboat)	816-483-8562 (Bishop)
(two calls)	918-542-2730	(Grayson)	918-786-2916 (Husong)
(two calls)	918-678-9292	(Showboat)	918-786-2916 (Husong)
	918-678-2916	(Husong)	918-678-9292 (Showboat)
	918-542-2730	(Grayson)	918-786-2916 (Husong)
March 13, 1972			
	918-542-2730	(Grayson)	918-786-2916 (Husong)
	918-786-2916	(Husong)	918-542-2730 (Grayson)
	918-542-2730	(Grayson)	918-786-2916 (Husong)
March 14, 1972			
	918-542-5547	(DA)	918-786-2916 (Husong)
March 15, 1972			
	918-542-2730	(Grayson)	918-786-2916 (Husong)
	918-542-2730	(Grayson)	918-786-2153 (Cotner)
(two calls)	918-786-2916	(Husong)	918-678-9292 (Showboat)
	918-786-9920	(Yuk)	918-678-9292 (Showboat)
(two calls)	918-786-2916	(Husong)	918-542-5547 (Grayson) and 918-542-2730 (Grayson)
March 16, 1972			
	918-542-2730	(Grayson)	918-786-2916 (Husong)
	918-786-9913	(Grove Hosp.)	918-678-9292 (Showboat)
	918-542-2730	(Grayson)	918-786-2916 (Husong)
March 17, 1972			
	918-786-9444	(Yuk)	918-678-9292 (Showboat)
	918-786-2916	(Husong)	918-542-5547 (Grayson)
	918-786-2916	(Husong)	918-542-2730 (Grayson)
	918-542-5547	(DA)	918-786-2916 (Husong)

FROM:		TO:
(two calls)	918-786-2916 (Husong)	918-542-2730 (Grayson) and 918-542-5547 (Grayson)
March 18, 1972		
	918-542-2730 (Grayson)	918-786-2916 (Husong)
	918-786-2916 (Husong)	918-542-2730 (Grayson)
	918-786-2916 (Husong)	918-542-2730 (Grayson)
	918-542-2730 (Grayson)	918-786-2916 (Husong)
March 19, 1972		
	918-542-2730 (Grayson)	918-786-2916 (Husong)
	918-542-2730 (Grayson)	918-786-2916 (Husong)
March 20, 1972		
	918-786-5020 (Cotner) (bill to 918-786-2916)	816-483-8562 (Bishop)
	918-542-2730 (Grayson)	918-786-2916 (Husong)
	918-542-5547 (DA)	918-786-2916 (Husong)
(three calls)	918-786-2916 (Husong)	918-542-5547 (1) (Grayson) and 918-542-2730 (2) (Grayson)
March 21, 1972		
	918-542-5547 (DA)	918-786-2916 (Husong)
	918-786-2916 (Husong)	918-678-9292 (Showboat)
	918-542-2730 (Grayson)	918-786-2916 (Husong)
(two calls)	918-786-2916 (Husong)	918-542-5547 (1) (Grayson) and 918-542-2730 (1) (Grayson)
March 22, 1972		
	918-786-9920 (Yuk)	918-678-9292 (Showboat)
	918-542-5547 (DA)	918-786-2916 (Husong)
	918-542-2730 (Grayson)	918-786-2916 (Husong)

FROM:	TO:
March 23, 1972	
918-786-2916 (Husong)	918-678-9292 (Showboat)
918-786-2916 (Husong)	816-221-6100 (FBI)
(three calls) 918-542-2730 (Grayson)	918-786-2916 (Husong)
(three calls) 918-542-5547 (DA)	918-786-2916 (Husong)
(three calls) 918-786-2916 (Husong)	918-542-5547 (1) (Grayson) and 918-542-2730 (2) (Grayson)
March 24, 1972	
918-676-9205 (Stardust Rest.)	918-786-9920 (Yuk)
918-786-2916 (Husong)	918-542-2730 (Grayson)
March 25, 1972	
918-767-9205 (Stardust Rest.)	918-786-9920 (Yuk)
918-542-2730 (Grayson)	918-786-2916 (Husong)
March 26, 1972	
918-786-2916 (Husong)	918-678-9292 (Showboat)
918-542-5547 (DA)	918-786-2916 (Husong)
March 27, 1972	
918-786-2916 (Husong)	918-542-2730 (Grayson)
March 28, 1972	
918-542-2730 (Grayson)	918-786-2916 (Husong)
March 29, 1972	
918-786-2916 (Husong)	918-542-2730 (Grayson)
918-786-2916 (Husong)	918-678-9292 (Showboat)
918-786-2916 (Husong)	918-542-2730 (DA Grayson)

FROM:		TO:	
April 4, 1972			
	918-786-2916	(Husong)	918-542-2730 (Grayson)
	918-542-2730	(Grayson)	918-786-2916 (Husong)
April 6, 1972			
	918-786-2916	(Husong)	918-678-9292 (Showboat)
(two calls)	918-786-2916	(Husong)	918-542-5547 (DA)
	918-542-5547	(DA)	918-786-2916 (Husong)
April 7, 1972			
	918-786-2916	(Husong)	918-542-2730 (Grayson)
	918-542-2730	(Grayson)	918-786-2916 (Husong)
	918-542-5547	(DA)	913-786-2916 (Husong)
April 8, 1972			
	918-786-2916	(Husong)	918-678-9292 (Showboat)
(two calls)	918-786-2916	(Husong)	918-542-2730 (Grayson)
April 11, 1972			
(two calls)	918-542-5547	(DA)	918-786-2916 (Husong)
April 13, 1972			
	918-786-2916	(Husong)	918-678-9292 (Showboat)
April 14, 1972			
	918-542-5547	(DA)	918-786-5026 (Cotner)
	918-542-2730	(Grayson)	918-786-2916 (Husong)
	918-786-2916	(Husong)	918-542-5547 (DA Grayson)
	918-542-5547	(DA)	918-786-2916 (Husong)
April 15, 1972			
	918-786-2916	(Husong)	918-542-2730 (Grayson)
April 17, 1972			
	918-786-9271	(Husong)	918-542-5547 (DA)

FROM:	TO:
April 18, 1972	
918-786-2916 (Husong)	918-678-9292 (Showboat)
918-786-2916 (Husong)	918-542-5547 (DA)
April 19, 1972	
918-542-5547 (DA)	918-786-2916 (Husong)
April 20, 1972	
918-542-5547 (DA)	918-786-5026 (Cotner)
918-786-2916 (Husong)	918-542-5547 (DA)
(two calls) 918-542-5547 (DA)	918-786-2916 (Husong)
April 25, 1972	
918-542-2730 (Grayson)	918-786-2916 (Husong)
April 26, 1972	
(two calls) 918-542-2730 (Grayson)	918-786-2916 (Husong)
April 27, 1972	
918-786-2153 (Cotner)	918-542-5547 (DA)
918-786-2916 (Husong)	918-542-2730 (Grayson)
(two calls) 918-542-2730 (Grayson)	918-786-2916 (Husong)
April 29, 1972	
918-786-2916 (Husong)	918-542-2730 (Grayson)
April 30, 1972	
(Two calls) 918-786-2916 (Husong)	918-542-2730 (Grayson)
(Two calls) 918-786-2916 (Husong)	918-542-2730 (Grayson)
918-542-2730 (Grayson)	918-786-2916 (Husong)
May 2, 1972	
918-786-2916 (Husong)	918-542-2730 (Grayson)

FROM:	TO:
May 6, 1972	
918-786-2916 (Husong)	918-542-2730 (Grayson)
May 8, 1972	
918-786-2916 (Husong)	918-542-2730 (Grayson)
May 10, 1972	
918-542-5547 (DA)	918-786-2916 (Husong)
May 12, 1972	
918-786-2916 (Husong)	918-542-2730 (Grayson)
May 15, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)
May 16, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)
918-786-2916 (Husong)	918-542-2730 (Grayson)
May 19, 1972	
918-786-2916 (Husong)	918-542-2730 (Grayson)
May 23, 1972	
918-542-5547 (DA)	918-786-2916 (Husong)
May 24, 1972	
918-542-5547 (DA)	918-786-5026 (Cotner)
May 25, 1972	
(two calls) 918-786-2916 (Husong)	918-542-5547 (DA)
May 26, 1972	
918-542-5547 (DA)	918-786-2916 (Husong)
June 27, 1972	
918-287-1773 (Pitts)	918-678-9292 (Showboat)
June 12, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)
June 15, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)

FROM:	TO:
June 16, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)
June 20, 1972	
918-786-2916 (Husong)	918-542-2730 (Grayson)
June 21, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)
July 3, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)
July 5, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)
July 6, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)
July 19, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)
July 26, 1972	
918-786-2916 (Husong)	918-542-5547 (DA)

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	15

CITATIONS

Cases:

Crain v. United States, 162 U.S. 625	15
Harrington v. *California*, 395 U.S. 250	9-10
Joyce v. *United States*, 454 F.2d 971, certiorari denied, 405 U.S. 969	15
Osborne v. *United States*, 351 F.2d111	8, 9
Turner v. *United States*, 396 U.S. 398	14
United States v. *Adams*, 385 F.2d 548	10
United States v. *Cochran*, 475 F.2d 1080, certiorari denied, 414 U.S. 833	11
United States v. *Goodwin*, 455 F.2d 710, certiorari denied, 409 U.S. 859	15
United States v. *Parker*, 469 F.2d 884	11

Constitution and statutes:

18 U.S.C. 371	2
18 U.S.C. 1952	2
18 U.S.C. 4208(b)	2
Oklahoma Constitution, Article 27, section 4	3

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1748

CLIFFORD LAVERN BISHOP, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2) is reported at 492 F.2d 1361. Two opinions of the district court (Pet. App. 1), filed on January 9 and February 28, 1973, are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1974. A petition for rehearing was denied on April 22, 1974. The petition for a writ of certiorari was filed on May 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were prejudiced when an exhibit not admitted into evidence was delivered to the jury.

2. Whether allegedly prejudicial remarks and testimony denied petitioners a fair trial.

3. Whether the evidence was sufficient to show that prostitution was one of the objectives of the charged conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Western District of Missouri, petitioners were convicted of conspiracy to violate 18 U.S.C. 1952, prohibiting interstate travel to establish an unlawful business involving gambling, prostitution and bribery, in violation of 18 U.S.C. 371. They were each sentenced to a term of five years' imprisonment and committed for a study pursuant to the provisions of 18 U.S.C. 4208(b). Petitioners' motions for new trials were denied (Pet. App. 1), and the court of appeals affirmed (Pet. App. 2; 492 F. 2d 1361).

The government's evidence showed that on May 12, 1971, Jess Roberts met with petitioner Grayson, then an Oklahoma District Attorney, to discuss Roberts' plan to erect a private club in Grove, Oklahoma, within Grayson's jurisdiction (Tr. 8-11).[1] Petitioner Gray-

[1] "Tr." refers to the four-volume transcript of the trial, a copy of which is being lodged with the clerk of this Court. Volume I is paginated 1a-143a. Volume II (headed "Partial

son advised Roberts on the operation of the club and stated that liquor and beer could be served (Tr. 10-11). Roberts' Mr. Yuk Club opened on August 26, 1971 (Tr. 15). After raids by local law enforcement officers on September 2, September 17, November 6, and November 19, 1971, he was charged with operating an open saloon (Tr. 21-22).[2]

Petitioner Bishop was introduced to Roberts on December 5, 1971 (Tr. 27-29). In mid-December, Bishop telephoned Roberts from Kansas City and suggested that he might be able to alleviate Roberts' problems with the raids through political connections (Tr. 30). Bishop also suggested that he had an idea to make money, and that he might join Roberts in a new business venture (Tr. 31). Roberts flew to Kansas City on December 22 and discussed with Bishop the possibility of establishing a vending machine business (Tr. 36-37). They were joined by petitioners Duardi and Brancato, and the four discussed the raids on the Mr. Yuk Club (Tr. 37-38). At Duardi's request, Roberts named the law enforcement officials involved, including petitioner Grayson (Tr. 38). Petitioners Duardi and Brancato suggested that they might be able to eliminate some of the raids (Tr. 38-39).

Transcript of Proceedings") is paginated 1-412; Volume III, 413-700; and Volume IV, 701-914. There is also a transcript of proceedings examining the jury panel, also headed "Partial Transcript of Proceedings" and paginated 1-38. This document will be referred to as "P. Tr." and is also being lodged, along with an index to the transcripts.

[2] Sale of liquor by the drink is prohibited in Oklahoma. Oklahoma Constitution, Article 27, section 4.

On January 7, 1972, the Mr. Yuk Club was again raided, charges were filed against Roberts, and all the furniture in the club was seized (Tr. 41). Roberts later discussed the raid with petitioner Grayson, who requested the meeting (Tr. 41-42). Grayson apologized for the raid, explaining that it was undertaken for political reasons (Tr. 42-43).

Petitioner Bishop visited Grove, Oklahoma, on January 12 and 13 and discussed the proposed vending machine business with Roberts and petitioner King, who owned the nearby Show Boat Club (Tr. 24, 44-45). Petitioner King noted that his club had also been raided, that his furniture had been seized, and that he had stolen the furniture back (Tr. 47). Through the help of petitioner Duardi, the charges had been reduced or dropped, for which King had given him a partnership in the Show Boat (Tr. 47-48).

On January 13, 1972, Roberts and petitioners Bishop and King drove to Kansas City where Roberts and Bishop entered into a partnership agreement giving Bishop an interest in the Mr. Yuk Club (Tr. 50-51, 452). During the return trip, the three thoroughly discussed the raids on the Mr. Yuk Club. Petitioner King stated that he had a prior arrangement with petitioners Grayson and Husong, a special investigator for Grayson, by which poker games were allowed in the Show Boat Club. King suggested that Husong should be contacted to relieve the legal pressure on the Mr. Yuk Club (Tr. 55).

The next day Roberts met with Husong, who indicated that the raids could be stopped and that gambling could be arranged (Tr. 59-60). Husong told Roberts that in return he and Grayson would need 20 percent of the gambling proceeds to keep other law enforcement officers away (Tr. 60, 62). A day later Husong told Roberts that a new car would also be needed for the local sheriff (Tr. 61). Roberts said that an additional room would have to be built for the gambling, that a motel and an amusement park were being considered, and that there would also be gambling at the Show Boat. Roberts then offered petitioner Husong 5 percent of the entire operations, rather than 20 percent of the gambling proceeds (Tr. 63).

On January 16, Roberts met with Bishop, Brancato, and Duardi and discussed the proposed agreement to be reached with Husong and Grayson (Tr. 67). Brancato suggested that a car be leased rather than purchased, so that it could be returned to the lessor if the law enforcement officers failed to honor their agreements (*ibid.*). In discussing the operation of the project, Duardi suggested that girls be employed to entertain and be companions for the customers (Tr. 69-70).

At Duardi's suggestion, Roberts met with Grayson and Husong the next day (Tr. 71). Grayson advised Roberts that anything said by Husong could be believed (Tr. 72). During the following two weeks, Roberts and petitioners Bishop, Brancato, Duardi,

and Husong met several times to discuss protection from raids, financing, and building of the expansion to the Mr. Yuk Club (Tr. 91-109). Mrs. Olivia Pitts, an unindicted co-conspirator, agreed during this period to obtain a loan through the Small Business Administration or Bureau of Indian Affairs to finance the proposed venture (Tr. 109).

On February 3, 1972, petitioner Bishop informed Roberts that he was leasing a car for the local sheriff (Tr. 111). The next day Bishop and Roberts delivered a 1972 Chevrolet Impala to petitioner Grayson (Tr. 112). Grayson decided to keep the car until after an upcoming election, to determine if the sheriff would be reelected (Tr. 114). Petitioner Husong agreed in return to give prior notification of any raids on the Mr. Yuk Club (Tr. 115).

Husong advised Roberts on February 25 that Treasury or Internal Revenue agents had told Grayson that they were coming to the area, and that there would be no further meetings until they left (Tr. 139). It appeared at this time that financing for the proposed venture would be unavailable (Tr. 140-141). On February 27, Husong advised Roberts that he and petitioner Grayson would honor the prior agreements on notification of raids and tolerance of gambling, that they would keep the car and make the payments on the lease, and that they would expect no percentage from the gambling (Tr. 143). After Internal Revenue agents arrived in Grove, petitioners King, Bishop, and Duardi decided to defer any further activity (Tr. 149, 151).

ARGUMENT

1. Petitioners urge that they were prejudiced by the delivery to the jury of an exhibit that was not admitted into evidence. Prior to trial, the parties stipulated in Stipulation Exhibit E that certain telephone records could be admitted into evidence, subject only to objections for relevancy or materiality. The stipulation was admitted as Court's Exhibit 1, but the attached copies of the telephone records were not admitted (Tr. 36a, 60a, 901). At trial, the government offered Exhibit R, entitled "Key to Review of Telephone Toll Records" (Pet. App. 3; Tr. 658), which listed the location of certain telephones, most of which were in the residences or businesses of petitioners or their co-conspirators (Pet. App. 3, pp. 47-50). It then listed numerous calls to and from those telephones during the period of the conspiracy (Pet. App. 3, pp. 51-66). The trial court sustained petitioners' objections to the exhibit because it contained irrelevant pay phone calls (Tr. 659).[3] The trial judge, in order to avoid the difficulties that might arise through the inadvertent transmittal of documents offered but not received in evidence, instructed the clerk to review the exhibits (Tr. 900-903). The one-foot high stack of exhibits (Tr. 901) was then

[3] Apparently, Exhibit R was discussed in chambers during the trial (Tr. 658). The prosecutor was advised that the exhibit would be admitted if certain calls between public pay telephones, in which the caller was not identified, were deleted (Pet. App. 1, p. 30). Those calls had not been deleted when the exhibit was offered in court (Tr. 658).

sent to the jury. When they were collected after the trial, Exhibit R was found with the properly admitted exhibits (Pet. App. 1, p. 29). The trial judge advised the parties that Exhibit R had apparently gone to the jury room with the other exhibits (*ibid.*).

Assuming that Exhibit R did go to the jury room, there was error. *Osborne* v. *United States*, 351 F. 2d 111, 115 (C.A. 8). But, as the district court found in considering petitioners' new trial motions, petitioners were not prejudiced (Pet. App. 1, pp. 33-35).

Petitioners magnify the significance of Exhibit R. They urge that it was the only corroboration of Roberts' testimony that certain telephone calls occurred. Roberts, the government's main witness, testified about many telephone conversations that occurred during the course of the conspiracy (Tr. 30, 42, 63-64, 71, 98, 100, 111, 121, 137, 146-147, 152, 299). The parties were identified and those calls were plainly relevant. Indeed, it is precisely those calls that would have been properly admitted in Exhibit R except that the exhibit also included some non-probative calls from pay telephones.[4] In any event, Exhibit R did not significantly corroborate the essential incriminating points of Roberts' testimony. Petitioners' defense was not that they did not deal with Roberts, but that they did not engage in an illegal enterprise with him. Since they admitted to dealing with Roberts, evidence

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[4] The jury could not have been misled as to those calls which involved pay telephones. The exhibit identifies each pay telephone involved and does not purport to identify the parties to any call.

of communications among petitioners and Roberts could not have prejudiced their defense or significantly influenced the jury's verdict.

Petitioners also note that one of the listed calls tends to impeach their only witness, Mrs. Pitts (Pet. 19-20). She testified that she first met petitioner Bishop on January 24, 1972 (Tr. 728-729). But Exhibit R shows a call from Mrs. Pitts' residence to petitioner Bishop's residence on January 19, 1972 (Pet. App. 3, p. 53), and therefore impeaches her testimony. However, the telephone record of that call was thoroughly used during cross-examination to impeach Mrs. Pitts' testimony (Tr. 734-735), and the jury could not have been further influenced by the inclusion of that call in Exhibit R.

The evidence against petitioners was overwhelming. Roberts' testimony was corroborated, in varying degrees, by sixteen other government witnesses and by substantial documentary evidence. Exhibit R was neither highly prejudicial nor inflammatory.[5] We submit that a reading of the record and consideration of the form and content of Exhibit R (Pet. App. 3) shows that the erroneous transmittal of that document could have had no significant impact on the minds of the average jury. See *Harrington* v. *Cali-*

[5] This case is therefore unlike *Osborne* v. *United States*, *supra*, 351 F.2d 111 (C.A. 8), where the court reversed when a "highly damaging and prejudicial" grand jury transcript was inadvertently delivered to the jury. 351 F.2d at 117.

fornia, 395 U.S. 250, 254. Petitioners' claim of prejudice is therefore without merit.[6]

2. Petitioners claim that allegedly prejudicial remarks and testimony denied them a fair trial (Pet. 21-22).

a. Overt act 22 of the indictment charged that petitioners Bishop and King attempted to kill Jess Roberts on March 16, 1972, "in order to carry on the establishment of the proposed gambling, prostitution and bribery activities without interference and to consolidate their control over those activities and the profits to be derived therefrom * * *" (P. Tr. 8). That part of the indictment was read to the jury panel during *voir dire*, and was referred to during the prosecutor's opening statement (P. Tr. 8; Tr. 45a, 50a-56a). Petitioners did not object to the references to the shooting. One witness testified that she remembered the last time petitioner Bishop was at her motel because that was the day Roberts was shot (Tr. 102a, 113a). Petitioners did not object or move to strike the testimony. On the next day, the court expressed doubts as to the admissibility of evidence of the shooting which, although charged as an overt act, would be prejudicial (Tr. 128-129). The prosecutor subsequently agreed not to introduce evidence re-

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[6] Petitioner urges that the opinion below is in conflict with *United States* v. *Adams*, 385 F.2d 548 (C.A. 2). In *Adams*, reversal was required where "a neat condensation of the government's whole case against the defendant" was sent to the jury, although not admitted into evidence. 385 F. 2d at 550. Exhibit R was by no means a summary of the government's case against petitioners. *Adams* thus does not conflict with the holding below.

lating to overt act 22 (Tr. 160). Thereafter, in response to a question on cross-examination, Roberts testified that he did not remember exactly what he told federal agents on March 23, 1972 because he was in the hospital under heavy sedation at that time (Tr. 313).

Petitioners' contention that these references were improper is without merit. Evidence of the shooting, although showing a crime not charged in the indictment, should have been admitted because the elimination of Roberts would have enabled petitioners to maintain more complete control over the proposed enterprise; it was thus an act in furtherance of the conspiracy. Moreover, the shooting showed intent and was thus admissible. *United States* v. *Cochran*, 475 F.2d 1080, 1082-1083 (C.A. 8), certiorari denied, 414 U.S. 833; *United States* v. *Parker*, 469 F.2d 884, 889-890 (C.A. 10).

In any event, petitioners were not harmed. The jury was instructed that there was no evidence of a shooting in the case, and that the reference to it in the government's opening statement was to be ignored (Tr. 856).

b. The government's evidence showed that petitioner Grayson used the leased car as security in obtaining a $2,000 loan (Tr. 650-652). Petitioners urge that this showing of this offense not charged in the indictment was improperly prejudicial. Petitioners were charged with conspiracy to bribe. Petitioner Grayson's use of the car as collateral indicates that he had received and accepted the car, which was the

bribe. The evidence was therefore properly admitted to show that an object of the conspiracy had been achieved.

c. Petitioners also assert that the prosecutors engaged in improper final argument by allegedly commenting on petitioners' failure to testify. After relating the testimony of Mrs. Pitts, the sole defense witness, the prosecutor stated (Tr. 791-792):

> Then you might contrast the evidence that the government has presented to you in corroboration of the events as we see them, as opposed to the evidence that the defense was able to present to you through cross-examination and through Mrs. Pitts, on the other side of the story.

That comment related only to the evidence presented by petitioners, not to their failure to testify, and was therefore proper.

Petitioner Bishop's attorney noted during closing argument that Mr. DeFeo, one of the government counsel, spoke only once during the entire case: to cross-examine Mrs. Pitts (Tr. 839). In rebuttal argument, DeFeo responded (Tr. 845-846):

> * * * as one of the defense counsel pointed out, I certainly have not taken a very active part in the trial of this case. However, under the division of responsibility between myself and Mr. Cornwell, it is his responsibility to handle the examination of the government witnesses and my responsibility to handle cross-examination of defense witnesses. As you saw, there was very little in the way of a defense, and consequently I had very little to do. However, I am happy to

> have the opportunity to handle this part of the argument, because it is a stage that is very important in the trial.

The statement was thus not a comment on petitioners' failure to testify, but rather an explanation of DeFeo's participation during the trial, a matter initially raised by the defense.

d. Lastly, petitioners urge that the prosecutor improperly argued that every witness who could discredit the government's main witness had testified. The prosecutor's full statement was as follows (Tr. 850):

> Mr. Williams [petitioner King's attorney] also touched upon the fact that Mr. Roberts had talked to government investigators and attorneys for eight days—or on eight days, he said about one day a month for eight months, something like that, and then that sort of ties into what Mr. Pierce said, "Would you be willing to have your fate decided upon the testimony in this case."
>
> Well, ladies and gentlemen, that ties into the government talking with Mr. Roberts for eight days, that ties in with the masses of documentary evidence here. The picture we want to present to you people, the evidence we want to present to you people, is that every logical avenue of investigation has been explored, that Roberts' testimony has been fully gone through, and every witness who was available to either corroborate or discredit him has been put before you.
>
> His employees, his records of his travel, you have all of that before you, and we think that based upon all that evidence you can be very certain in your own minds that his testimony is

> amply corroborated, that these defendants did what they are accused of doing, and that you could render a verdict of conviction without any reasonable doubt.

The argument was in response to petitioners' repeated attacks on Roberts' credibility and did not relate to petitioners' failure to testify. Had it been intended as a reference to petitioners, the import of the challenged statement would have been that petitioners could neither corroborate nor discredit Roberts' testimony. But in light of Roberts' testimony about petitioners' activities, the government would not have made such an argument. It follows that the statement could not have been intended or construed as a comment on petitioners' failure to testify.[7]

3. Petitioners urge that the evidence is insufficient to show that prostitution was an objective of the conspiracy (Pet. 22-24). They were charged with conspiracy to establish a business involving gambling, bribery and prostitution. It is well settled that where the indictment conjunctively alleges several ways in which an illegal act may occur, as petitioners' indict-

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[7] Petitioners also urge that three improper references were made regarding unnamed persons who may have been involved in the conspiracy (Pet. 22). However, the indictment charged the conspiracy among petitioners, Roberts, Mrs. Pitts, and "other persons whose identities are to the Grand Jury unknown" (Tr. 862-863). In any event, the references were isolated (Tr. 122, 469, 494-495). The first remark was stricken (Tr. 130) and there was no objection to the second (Tr. 469). Whether these statements were improper or not, petitioners could not possibly have been harmed.

ment does, the conviction stands if the evidence is sufficient with respect to any of the acts charged. See, *e.g.*, *Turner* v. *United States*, 396 U.S. 398, 420; *Crain* v. *United States*, 162 U.S. 625, 636; *United States* v. *Goodwin*, 455 F.2d 710, 714 (C.A. 10), certiorari denied, 409 U.S. 859; *Joyce* v. *United States*, 454 F.2d 971, 976-977 (C.A.D.C.), certiorari denied, 405 U.S. 969. Petitioners do not challenge the sufficiency of the evidence relating to the gambling and bribery aspects of the conspiracy. Accordingly, even if the evidence does not sufficiently show that prostitution was contemplated, petitioners' claim is without merit.

In any event, the evidence showed that petitioners planned to hire women who would "double as waitresses" and act as companions for the customers who would be getting away from their wives and businesses (Tr. 69-70). The women would accompany the customers to their rooms, at the customers' expense (Tr. 96). The jury could thus infer, because payment for the "companionship" was involved, that prostitution was contemplated.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1974.

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